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STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION

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DECLARATORY RULING NO. 5

INITIATIVE CAMPAIGN RECEIVING FREE AIR TIME  
UNDER FAIRNESS DOCTRINE (RCW 42.17.020(10);  
WAC 390-05-210): A contribution does not  
result from a good faith decision by a  
broadcaster to provide free air time to an  
initiative campaign when advised by counsel  
that the "Fairness Doctrine" requires that  
action (December 13, 1988).

The Honorable Ruth Fisher  
Representative, 27th District  
513 North E Street  
Tacoma, WA 98403

Michael E. Kipling  
Attorney for Fisher Broadcasting, Inc.  
Graham & Dunn, Attorneys at Law  
34th Floor, Rainier Bank Tower  
1301 Fifth Avenue  
Seattle, WA 98101-2653

Dear Ms. Fisher and Mr. Kipling:

You petitioned for a declaratory ruling under RCW 34.04.080 and WAC 390-12-250 regarding whether free broadcasting time which is provided by television and radio broadcasters pursuant to the "Fairness Doctrine" adopted by the Federal Communications Commission (FCC) is a "contribution" as defined by RCW 42.17.020(10). At our regular meeting held on October 25, 1988, Commissioners Beck, McGough and Struthers orally issued a binding declaratory ruling that such free broadcasting time is not a "contribution" under RCW 42.17.020(10). It was also decided to issue this written ruling so as to permit Commissioners Proctor

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*"The public's right to know of the financing of political campaigns and lobbying  
and the financial affairs of elected officials and candidates far outweighs  
any right that these matters remain secret and private."*

RCW 42.17.010 (10)

and Wilson an opportunity to review the matter and to provide guidance for broadcasters and others in the future.

Your question concerns our interpretation of RCW 42.17.020(10) which reads:

(10) "Contribution" includes a loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds between political committees, or transfer of anything of value, including personal and professional services for less than full consideration, but does not include interest on moneys deposited in a political committee's account, ordinary home hospitality and the rendering of "part-time" personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of twenty-five dollars personally paid for by the worker. "Part-time" services, for the purposes of this chapter, means services in addition to regular full-time employment, or, in the case of an unemployed person, services not in excess of twenty hours per week, excluding weekends. For the purposes of this chapter, contributions other than money or its equivalents shall be deemed to have a money value equivalent to the fair market value of the contribution. Sums paid for tickets to fund-raising events such as dinners and parties are contributions; however, the amount of any such contribution may be reduced for the purpose of complying with the reporting requirements of this chapter, by the actual cost of consumables furnished in connection with the purchase of the tickets, and only the excess over the actual cost of the consumables shall be deemed a contribution.

#### FACTUAL BACKGROUND

At the November 8, 1988, general election, the voters will be asked to choose between two alternative ballot propositions dealing with the issue of toxic waste clean-up, Initiative 97 and Alternative Measure 97B. Counsel representing a number of broadcasters have advised their clients that the election

campaign involves a "controversial issue of public importance." The broadcasters have been advised that the Fairness Doctrine of the FCC requires contrasting viewpoints be presented to the public. As a result, various broadcasters have agreed to air political advertising prepared by the supporters of Initiative 97 free of charge. The enforcement of the Fairness Doctrine by the FCC permits the broadcaster some discretion in determining the nature and frequency of the free air time. The supporters of Initiative 97 stated that they have been granted time which ranges from one minute for every four minutes purchased by their opponents to one minute for every seven minutes. The fair market value of such air time will be substantial.

We understand that the broadcasters may select various alternatives when attempting to satisfy the duty to present contrasting viewpoints. Here, the broadcasters chose to air advertisements which had been produced for the political committee supporting Initiative 97. We do not believe this Commission should "second-guess" the good faith decision of the broadcasters.

No person asserted that the decision of the broadcasters was made in bad faith to hide an intent to benefit Initiative 97. In fact, several broadcasters had editorialized in favor of Alternative Measure 97B. The legal advice was given in good faith without reference to the merits of the alternative ballot propositions. There is no indication that the free air time was provided as part of an effort to support or oppose either of the ballot propositions.

#### ANALYSIS

Initially, we note that the Commission has recognized that the drafters of the Public Disclosure Act did not intend that campaigns report such things as news stories, feature articles or editorials appearing in the print or electronic media. These are expressions protected by the First Amendment of the Constitution which may be chilled by any governmental effort to require their fair market value to be reported. Campaigns cannot purchase a news story, feature article or editorial. Such matters may be of immeasurable benefit (or harm) to a campaign; however, they have never been considered to be contributions. SEE WAC 390-16-206.

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The statute defines "contribution" very broadly. Certainly, it would include a situation where a broadcaster voluntarily provided free air time to a candidate or a campaign supporting or opposing a ballot proposition. Similarly, a contribution results from voluntarily providing air time at less than fair market value. Those, however, are not the facts before us.

Here, the broadcasters have received legal advice that they must provide the air time to the supporters of Initiative 97 in order to comply with the current requirements of the Fairness Doctrine. The resource is provided under legal compulsion, not voluntarily.

The statutory definition of a "contribution" necessarily implies an intent to voluntarily provide resources to an election campaign at less than fair market value. One of the basic purposes of requiring disclosure of contributions is to permit the public to identify those persons supporting election campaigns. Here, the resource (free air time) is not being provided<sup>1</sup> with intent to support the Initiative 97 election campaign.<sup>1</sup> Showing the broadcasters as contributors and, at least implying their support for that campaign would be misleading.

It is essential to our decision that the decisions of the broadcasters are made in good faith. Here, no one contends that the broadcasters are asserting the Fairness Doctrine as a shield to hide their true intent to benefit the Initiative 97 campaign. The broadcasters have received legal advice that they are required to provide free air time. Our decision is grounded upon these facts. We would carefully examine any assertion that the

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<sup>1</sup> We have asked the Initiative 97 campaign to voluntarily indicate in its reports the value of the air time which is provided. We believe the public should be aware that this resource is available so that any comparisons between the campaigns will more accurately reflect the resources available to each. At the hearing, the supporters of Initiative 97 indicated that they would do so.

decision was made in bad faith as a way to avoid any of the requirements of the Public Disclosure Act.

The concern of the broadcasters was that if the free air time was a contribution and if the decision to provide that time was made during the three weeks before the general election, a possible violation of RCW 42.17.105(8) would occur. That statute prohibits giving or receiving a contribution in excess of \$5,000 during that twenty-one-day period. We believe, however, that even if a contribution resulted, this state law prohibition would be pre-empted by the federal requirements.

As we understand it, the Fairness Doctrine would require the broadcasters to afford the opposing viewpoint a reasonable opportunity to present their side of the issue. Here, the legal advice had been that the Initiative 97 supporters would be entitled to one-fourth to one-seventh of the air time purchased by the Initiative 97B supporters. Counsel for the broadcasters have advised that this is legally required pursuant to federal regulation promulgated by the FCC.

The United State Supreme Court has recognized that state law is superceded to the extent that it conflicts with valid regulations of federal administrative agencies. Public Utilities Comm'n v. U.S., 333 U.S. 118; Illinois C.R. Co. v. State Pub. Utilities Comm'n, 245 U.S. 493. Here the state law would substantially reduce the amount of time which the Fairness Doctrine would require be afforded. We believe that this conflict between state law and federal regulation would be resolved in favor of the federal requirement. This is especially true when the state law would effectively limit political speech which a federal agency has determined to be necessary for a complete discussion of a controversial issue of public importance.

We recognize that the Fairness Doctrine may be modified or eliminated by the FCC. In fact, the validity of the doctrine is now the subject of debate with some arguing that the FCC has recently abandoned its enforcement of the doctrine in all cases. Others argue that it only has validity when questions of access are raised in ballot proposition campaigns. We do not believe this debate can be resolved by the Public Disclosure Commission.

We simply do not have the expertise or authority to interpret the requirements of the FCC. What is important is that the broadcasters have made a good faith decision that the Fairness Doctrine requires them to present contrasting viewpoints on a controversial issue of public importance, as evidenced by the fact that they have been advised by counsel. As the Fairness Doctrine evolves (or expires), we assume the legal advice will also evolve.

Therefore, readers should be cautious in applying this ruling to situations that may arise in the future.

#### CONCLUSION

We therefore hold that under the circumstances set forth above, air time provided without charge in advocacy of Initiative 97 does not constitute a contribution within the meaning of RCW 42.17.020(10) because rather than being voluntary, it is required by the Fairness Doctrine and also because even if this were not the case, federal regulations supercede state law when the two are in conflict.

Rita A. Buck  
Chairman

Guo A. Olson  
Commissioner

John Stutman  
Commissioner

Paul A. Porter  
Commissioner

Nancy R. McLaughlin  
Commissioner

Attest:

Dickson E. Johnson  
Executive Director  
Title

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